The Commonwealth of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

March 23, 1999

D.T.E. 97-116-B

Complaint of MCI WorldCom, Inc. (successor-in-interest to WorldCom Technologies and MFS Intelenet Service of Massachusetts, Inc.) against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996.

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INTERLOCUTORY ORDER ON BELL ATLANTIC MOTION FOR STAY

I. INTRODUCTION

On October 21, 1998, the Department of Telecommunications and Energy ("Department") issued an Order granting the petition of MCI WorldCom, Inc.[1] ("MCI") and directing Bell Atlantic-Massachusetts ("Bell Atlantic") to continue reciprocal compensation payments[2] for the termination of local exchange traffic to Internet service providers ("ISPs") in accordance with its interconnection agreements. WorldCom Technologies, Inc., D.T.E. 97-116, at 12 (1998) ("MCI WorldCom"). The Department applied its finding to all interconnection agreements between Bell Atlantic and Competitive Local Exchange Carriers ("CLECs"). Id. at 13.

The Department determined that a call to an ISP is functionally two separate services: (1) a local call to the ISP, and (2) an information service provided by the ISP when the ISP connects the caller to the Internet. Id. at 11. Because the Department decided that a call from a Bell Atlantic customer to an ISP that is terminated by a CLEC, such as MCI, is a "local call," for purposes of Bell Atlantic's interconnection agreements, CLECs transporting and terminating

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[1] MCI WorldCom, Inc. is the successor-in-interest to WorldCom Technologies, Inc. which is the successor-in-interest to MFS Intelenet Service of Massachusetts, Inc. ("MFS"). MFS is the entity that filed the original complaint in this docket.

[2] Section 251(b)(5) of the Telecommunications Act of 1996 (the "Act") requires all local exchange carriers to compensate each other for the transport and termination of local traffic that originates on one carrier's network and terminates on another carrier's network. 47 U.S.C. § 251(b)(5). The Federal Communications Commission has interpreted this provision as limiting reciprocal compensation payments to only the transport and termination of local traffic. See 47 C.F.R. § 51.701.

calls to ISPs are eligible for reciprocal compensation. Id. at 12-13. In its Order, the Department recognized that proceedings pending before the Federal Communications Commission ("FCC") could require a modification to the findings contained therein. Id. at 5 n.11. Finally, concerns that ISPs in Massachusetts may be establishing themselves as CLECs solely to receive reciprocal compensation from Bell Atlantic prompted the Department to request information that would enable it to determine whether to open an investigation into the regulatory status of particular CLECs. Id. at 13.

II. Post-Order Procedural Background

On November 10, 1998, MCI filed a Motion for Reconsideration arguing that the Department's decision possibly to open an investigation into the regulatory status of certain CLECs was not consistent with the Act. MCI also requested an extension of the judicial appeal period. On November 6, 1998, Bell Atlantic also filed a Motion for Extension of the Judicial Appeal Period for all parties until 20 days after the FCC issues a ruling on reciprocal compensation for dial-up Internet-bound traffic. On November 10, 1998, the Department granted Bell Atlantic's motion.

On February 25, 1999, the Department issued an Order denying MCI's Motion for Reconsideration, finding that the Department's general supervisory and regulatory jurisdiction permits it to request information from telecommunications carriers and to use that information in determining whether to open an investigation.[3] MCI WorldCom, D.T.E. 97-116-A at 4

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[3] Prior to issuing MCI WorldCom, Inc., D.T.E. 97-116-A (Feb. 25, 1999), the Department's Telecommunications Division issued formal data requests to ten CLECs to determine whether their customer bases were predominately or solely ISPs, and whether any affiliate relationship exists between the CLECs and their ISP customers. Responses were received on or before January 20, 1999.

(February 25, 1999).

On February 26, 1999, the FCC issued a Declaratory Ruling and Notice of Proposed Rulemaking in which it decided, among other things, that ISP-bound traffic is interstate in nature. In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68 (rel. Feb. 26, 1999) ("Declaratory Ruling"). Specifically, the FCC concluded that ISP-bound traffic does "not terminate at the ISP's local server . . . but continue[s] to the ultimate destination or destinations, specifically at a[n] Internet website that is often located in another state." Declaratory Ruling at ¶ 12. Having decided that the jurisdictional nature of ISP-bound traffic is determined by the nature of the end-to-end transmission between an end user and the Internet, Id. at ¶ 18, the FCC concludes that a substantial portion of ISP-bound traffic is interstate. Id. at ¶ 20. However, the FCC also found that the record was insufficient to make a determination on the appropriate compensation for this type of traffic, and, therefore, opened a rulemaking to address that issue. Id. at ¶ 21. Pending completion of that rulemaking, the FCC found that state commissions could continue to determine the appropriate reciprocal compensation for dial-up Internet traffic. Id. at ¶ 22. The FCC explicitly stated that, pending the outcome of its rulemaking, state commissions could either continue to enforce existing reciprocal compensation obligations between carriers under interconnection agreements or could modify those obligations based on its findings in the Declaratory Ruling. Id.

On March 2, 1999, Bell Atlantic filed a Motion for Modification of the Department's MCI WorldCom Order ("Motion for Modification") to relieve Bell Atlantic of its continuing

obligation, pursuant to existing interconnection agreements, to pay reciprocal compensation for Internet-bound traffic. Bell Atlantic argues that because the FCC determined that ISP-bound traffic is non-local interstate traffic, the reciprocal compensation requirements of the Act and the FCC's rules do not govern inter-carrier compensation for this traffic (Motion for Modification at 2). Therefore, Bell Atlantic contends that it is no longer required to make such payments, and states that it will escrow reciprocal compensation payments for Internet traffic until the Department modifies MCI WorldCom (id.).[4] The Department originally established a deadline of March 19, 1999 for responses to the Motion for Modification, and March 26, 1999 for Bell Atlantic's reply.

On March 9, 1999, Department staff contacted Bell Atlantic to indicate the Department's concern that Bell Atlantic's announced unilateral action concerning escrow of reciprocal compensation appeared to violate the MCI WorldCom Order, and that Bell Atlantic was still required to make such payments absent a Department suspension of that obligation. On March 10, 1999, Bell Atlantic filed a Motion for Stay Pending Decision on Motion for Modification ("Motion for Stay"), for permission to escrow reciprocal compensation pending a Department ruling on its Motion for Modification.[5] The Department established a deadline for

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[4] Bell Atlantic states that it will escrow amounts billed to any CLEC that terminates at least twice as much traffic as it sends to Bell Atlantic, but that if a CLEC demonstrates that the imbalance is associated with "local" traffic, Bell Atlantic will pay reciprocal compensation charges for those calls (Motion for Modification at 2 n.3).

[5] Bell Atlantic notes that it filed the Motion for Stay to ensure that there is "no ambiguity regarding [Bell Atlantic's] ability to withhold payments while the Department considers the Motion for Modification" (Motion for Stay at 3 n. 2).

responses of March 12, 1999, and a deadline for Bell Atlantic's reply of March 15, 1999.[6] Comments were filed by MCI, Level 3 Communications, Inc. ("Level 3"),[7] RCN-BecoCom, LLC ("RCN"), Choice One Communications, Inc. ("Choice One") (joined by PaeTec Communications, Inc.), a coalition of Massachusetts CLECs and ISPs (the "Coalition"), Focal Communications Corporation ("Focal"), Global NAPs, Inc. ("GNAPS"),[8] New England Voice & Data, LLC ("NEVD"), Norfolk County Internet ("Norfolk"), Prism Operations, LLC ("Prism"), and RNK, Inc. ("RNK").[9] Bell Atlantic filed reply comments on March 15, 1999.[10]

In this Order, the Department only addresses Bell Atlantic's Motion for Stay. In a subsequent Order to be issued shortly, the Department will rule on Bell Atlantic's Motion for Modification.

III. POSITIONS OF THE PARTIES AND COMMENTERS

A. Bell Atlantic

Bell Atlantic argues that its Motion for Stay should be granted because (1) there is a substantial likelihood that Bell Atlantic will prevail on the merits of its Motion for Modification, (2) absent the stay, it will suffer irreparable harm, (3) CLECs will not be harmed by granting the

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6 In addition to parties to D.T.E. 97-116, the Department allowed comments from all facilities-based CLECs with interconnection agreements with Bell Atlantic.

7 Level 3 is the successor-by-merger of XCOM Technologies, Inc., which is an intervenor.

8 On March 4, 1999, GNAPS filed a petition for intervention. The Department has yet to rule on that petition.

9 RCN, Choice One, the Coalition, Focal, GNAPS, NEVD, Norfolk, Prism, and RNK are not parties in D.T.E. 97-116.

10 With the Department's permission, MCI filed its response on March 15, 1999, and Bell Atlantic filed its reply to MCI's response on March 18, 1999.

stay, and (4) the public interest would be served with a grant of stay.

Bell Atlantic contends that the primary basis for the Department's decision in D.T.E. 97-116 (that dial-up Internet traffic is "local" under interconnection agreements) has been completely undermined by the FCC's "end-to-end" analysis in the Declaratory Ruling (Bell Atlantic Reply Comments at 3, citing D.T.E. 97-116, at 11). Based on the FCC's analysis, Bell Atlantic argues that Internet-bound calls no longer qualify for reciprocal compensation under Bell Atlantic's interconnection agreements (id.).

In addition, Bell Atlantic argues that the FCC's decision to commence a rulemaking on inter-carrier compensation for Internet traffic is a totally separate inquiry from the question of contractual interpretation that the Department considered in MCI WorldCom -- the only matter now at issue in this case (Bell Atlantic Reply Comments at 3; Motion for Stay at 4 n.3). Bell Atlantic contends that the Department may proceed with an investigation of inter-carrier compensation for ISP-bound traffic pending the FCC's final rulemaking, but only after adequate notice and the opportunity for comment pursuant to G.L. c. 30A, § 11(1), (3) and 220 C.M.R. § 1.06(5), (6) (Bell Atlantic Reply Comments at 3-4; Motion for Stay at 4-5 n.3).

Bell Atlantic argues that the escrow mechanism is necessary to protect Bell Atlantic from irreparable harm. According to Bell Atlantic, if in ruling on the Motion for Modification, the Department decides that it is not required to make reciprocal compensation payments, Bell Atlantic may not be able to recover payments made to certain carriers (Motion for Stay at 1-2; Bell Atlantic Reply Comments at 10). Bell Atlantic states that it filed the Motion for Stay to ensure that there is no ambiguity regarding its ability to withhold payments while the Department considers the Motion for Modification (Bell Atlantic Reply Comments at 10 n.2).

Bell Atlantic asserts that no other party will be harmed. If the Department denies Bell Atlantic's Motion for Modification requiring Bell Atlantic to continue to pay reciprocal compensation to CLECs, these escrow payments will protect CLECs (Motion for Stay at 5-6). Beli Atlantic argues that public interest demands a grant of stay. According to Bell Atlantic, allowing CLECs to receive reciprocal compensation for ISP calls has undermined the development of facilities-based local competition (id. at 6).

B. CLECs[11]

The CLECs all strongly oppose Bell Atlantic's Motion for Stay. First, the CLECs contend that the Motion for Stay is procedurally improper. GNAPs argues that Bell Atlantic does not seek the normal function of a stay, which is to keep the status quo, but rather, that Bell Atlantic seeks to reverse the status quo by not paying reciprocal compensation for ISP-bound calls (GNAPs at 4). GNAPs states that it is extremely rare for courts to grant preliminary relief to a party, resulting in reversal of the status quo while the matter is still pending (GNAPs at 8).

Prism argues that Bell Atlantic errs in citing G.L. c. 30A, § 14(3) in seeking a grant of a stay because "neither the enabling statutes nor the Department's procedural rules provide for the grant of a stay five months after a final Department order" (Prism Comments at 1). Prism states that the statutory provision referred to by Bell Atlantic is applicable only where a party is seeking reconsideration or judicial review of an agency order within the specific time periods (id. at 2). MCI echoes those comments, stating that only the Supreme Judicial Court, not the Department, may stay a Department order (MCI Comments at 2-3). MCI also states that 220 C.M.R. §§ 1.11

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[11] For ease of reference, we group similar arguments of CLECs together.

through 1.13 do not allow for a stay of a Department final order (id. at 3-4). In addition, Level 3 points out that in the context of a request for a stay pending judicial review, the Department has indicated in the past that, "such a request is rare, and we are not aware that the Department ever has granted such relief" (Level 3 Comments at 1, citing Boston Edison Company, D.P.U. 92-130-A at 5 (1993)).

The CLECs also contend that should the Department consider the merits of the Motion for Stay, Bell Atlantic utterly fails to satisfy any of the four factors necessary for a stay of the Department's MCI WorldCom Order (see e.g., Focal Communications Comments at 1; NEVD Comments at 1; Level 3 Comments at 1; Choice One Comments at 5; GNAPS Comments at 4-5; Prism Comments at 2; Coalition Comments at 3; RNK Comments at 1-2; Norfolk Comments at 1-2; MCI Comments at 1-2). First, they argue that Bell Atlantic does not have a reasonable likelihood of success on the merits because the Declaratory Ruling permits the Department to continue requiring reciprocal compensation even if the original basis for its decision has been undermined by the FCC's order (see, e.g., Level 3 Comments at 3). The CLECs argue that it is the interconnection agreements that control, pending the FCC's rulemaking (id.).

Second, the CLECs assert that Bell Atlantic will not be irreparably harmed by having to continue making reciprocal compensation payments. They state that "unnecessary expenditure of money" does not qualify as irreparable harm (see, e.g., Level 3 Comments at 3, citing Waterbury Hospitals v. Commission on Hospital and Health Care, 316 A.2d 787, 789 (Conn. C.P. 1974)).

Third, the CLECs argue that Bell Atlantic is wrong in stating that CLECs would not be harmed by the stay. Level 3, for example, argues that it is obvious that CLECs incur costs in

transporting and terminating calls to ISPs that are originated by Bell Atlantic's customers, and those CLECs would be left without compensation if the Department were to grant a stay, and thus would have to use money that would be better utilized in expanding operations or providing additional facilities (Level 3 Comments at 4).

Fourth, the CLECs contend that the public interest demands a denial of the Motion for Stay. Level 3 asserts that Bell Atlantic's allegation that reciprocal compensation serves as disincentive to facility-based competition in Massachusetts is not substantiated (id. at 5).

In addition, RCN argues that Bell Atlantic wrongly presumes that the FCC's recent Declaratory Ruling overturns the Department's MCI WorldCom Order (RCN Comments at 1-2). According to RCN, preemption of state regulation by the federal government would require "(1) the impossibility to separate the interstate and intrastate components of the FCC regulation and (2) the state regulation negating the FCC's lawful authority over interstate communications" (id. at 3). RCN contends that Bell Atlantic has not shown how the well-established federal preemption test has been met (id. at 3). RCN further argues that even if Bell Atlantic has met the requirement for federal preemption, that conclusion should not cause the Department to reverse its Order because nothing in the Declaratory Ruling modifies the status quo (id. at 4).

III. ANALYSIS AND FINDINGS

As we stated above, the Department addresses Bell Atlantic's Motion for Stay in this order. The Department agrees with the CLECs that Bell Atlantic's Motion for Stay is procedurally improper for obtaining the interim relief it seeks. Pursuant to G.L. c. 30A, §14(3), the Department may grant a stay pending judicial appeal of a Department Order under certain

circumstances.[12] In this case, Bell Atlantic has not filed an appeal of MCI WorldCom nor has it indicated whether it will in fact do so. Instead, Bell Atlantic seeks a stay pending modification of the MCI WorldCom Order. However, "[n]either the enabling statutes nor the Department's procedural rules provide explicitly for a stay pending reconsideration of a Department order." CTC Communications Corp., D.T.E. 98-18-A at 4 (July 24, 1998). In D.T.E. 98-18-A, the Department, in effect, set aside operation of a "premature" final order to allow Bell Atlantic to present key evidence that it had withheld under the belief that the Department would be first issuing an order on the scope of the proceedings. Id. at 5, 8-10. While in D.T.E. 98-18-A, the Department did grant a stay pending reconsideration of its final order to correct a procedural error, the circumstances in this case present no such procedural infirmities. For these reasons, we find that Bell Atlantic's Motion for Stay is not the procedurally correct method for obtaining the interim relief it seeks, and, therefore, we deny the motion. However, for the reasons discussed below, we find that the substantive interim relief sought in the motion (i.e., the permission to escrow reciprocal compensation payments pending a ruling on the Motion for Modification) should be granted.

When the Department issued the MCI WorldCom Order, we made it very clear that we might need to modify our findings based upon pending FCC investigations. D.T.E. 97-116, at 5 n.11. Specifically, we stated: "We agree . . . that the FCC has jurisdiction over Internet traffic.

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[12] Section 14(3) provides that "the commencement of an action [for judicial review] shall not operate as a stay of enforcement of the agency decision, but the agency may stay enforcement, and the reviewing court may order a stay upon such terms as it considers proper." G.L. c. 30A, § 14(3).

Pursuant to that authority, the FCC may make a determination in proceedings pending before it that could require us to modify our findings in this Order." Id. Thus, carriers have been on notice of the possibility for modification -- perhaps swift modification -- of the terms governing reciprocal compensation for Internet-bound traffic.

Bell Atlantic has argued that, as a result of the FCC's Declaratory Ruling, it is no longer obligated to pay compensation for Internet-bound traffic. The CLECs have argued that nothing in the FCC's declaratory ruling disturbs the Department's original findings in D.T.E. 97-116, and, therefore, Bell Atlantic should continue to make reciprocal compensation payments as directed in that Order. Clearly, the parties are in dispute on these payments, and the FCC's declaratory ruling raises legitimate questions about the Department's finding that ISP-bound traffic is local in nature and thus eligible for reciprocal compensation payments. Declaratory Ruling at ¶ 27. Escrow of monies is a well-established method for handling disputed amounts under commercial agreements. See, e.g. Mass. R. Civ. Proc. Rule 67 (authorizing the deposit of disputed funds with a court). In addition, it is a method by which Bell Atlantic and certain CLECs have already agreed to use in the event of disputed payments under their interconnection agreements. See, e.g., MFS Intelenet/NET Agreement at § 29.11; GNAPs/NET Agreement at § 29.11; XCOM/NET Agreement at § 29.11.1. Therefore, pursuant to our authority under § 252(e)(1) of the Act to enforce the terms of interconnection agreements, we find that Bell Atlantic may escrow reciprocal compensation payments, in the manner requested,[13] pending our ruling on its Motion for Modification. We note that interim relief is not a standard Department

[13] We direct that the escrow account shall be interest bearing.

practice,[14] but the unique circumstances in this case (i.e., the Department specifically stated that we may modify our findings in response to an FCC determination, and some interconnection agreements provide for an escrow mechanism) warrant the granting of interim relief.

IV. PROCEDURAL SCHEDULE FOR CONSIDERATION OF MOTION FOR MODIFICATION

Parties to D.T.E. 97-116-B and all facilities-based carriers with interconnection agreements are invited to participate in oral arguments to be held at the Department's offices on March 31, 1999 at 10 a.m. Consideration of arguments made by non-parties to D.T.E. 97-116-B does not confer any rights (e.g., right to appeal a Department decision) on those carriers. In addition, the Department will permit non-attorneys to comment on the Motion for Modification. The Department notes that a Hearing Officer notice dated March 18, 1999 established the deadline for written responses to Bell Atlantic's Motion for Modification as March 23, 1999, and gave Bell Atlantic until 5:00 p.m., March 29, 1999 to file a reply.

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[14] But see, Boston Edison Company, D.P.U. 92-130-2, at 10-13 Interlocutory Order on Request for Stay (Aug. 4, 1992) (granting a stay of a Department Order requiring Boston Edison Company to negotiate and execute a contract regarding RFP 3 while an underlying decision on whether RFP 3 should continue remained to be determined).

V. ORDER

After due consideration, it is hereby

ORDERED: That the Motion for Stay, filed by New England Telephone and Telegraph Company d/b/a Bell Atlantic - Massachusetts on March 9, 1999, is DENIED; and it is

FURTHER ORDERED: That New England Telephone and Telegraph Company d/b/a Bell Atlantic - Massachusetts shall escrow reciprocal compensation payments for Internet-bound traffic for CLECs that terminate twice as much traffic as they originate, pending a ruling on Bell Atlantic's Motion for Modification.

By Order of the Department,

Janet Gail Besser, Chair

James Connelly, Commissioner

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner

A true copy
Attest:

MARY L. COTTRELL
Secretary

The Commonwealth of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

May 19, 1999

D.T.E. 97-116-C

Complaint of MCI WorldCom, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996.

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SUMMARY

In February 1999, the Federal Communications Commission ("FCC") declared that telephone traffic bound for Internet service providers ("ISP-bound traffic") and thence onward to Internet websites is a single *interstate* call ("one call") and is therefore subject to FCC jurisdiction under the 1996 Telecommunications Act ("1996 Act"). The FCC's "one call" ruling effectively undercut the jurisdictional claim of any state utility regulatory agency over ISP-bound traffic, insofar as an agency asserted that calls to Internet websites were severable into two components: (1) one call terminating at the ISP and (2) a subsequent call connecting the ISP and the target Internet website. The FCC did not judge state regulators' decision that rested on other bases, apart from noting that decisions resting on state contract law or other legal or equitable considerations "might" still be valid until the FCC issued a final rule on the matter.

In MCI WorldCom Technologies, Inc., D.T.E. 97-116 (1998) ("Order"), relying on prior FCC's decisions that seemed to give greater scope for state jurisdiction over ISP-bound traffic, the Department of Telecommunications and Energy ("Department") had earlier ruled in favor of MCI WorldCom (a competitive local exchange carrier or "CLEC") upon its complaint that the interconnection agreement with Bell Atlantic-Massachusetts, under Section 251 of the 1996 Act, required the payment of reciprocal compensation for handling one another's ISP-bound traffic. The Order held that this interconnection agreement required reciprocal compensation for terminating ISP-bound traffic. The *express and exclusive* basis for the holding was (a) that the link between caller and ISP in ISP-bound traffic was jurisdictionally severable from the continuing link onward from the ISP to the target Internet site, (b) that ISP-bound traffic was thus "local" under the 1996 Act and the interconnection agreement, and (c) that ISP-bound traffic was, therefore, subject to Department jurisdiction as an *intrastate* rather than an *interstate* call. The Department noted that other CLECs' interconnection agreements with Bell Atlantic contained identical provisions and directed Bell Atlantic to treat them accordingly. The Department's Order claimed no other basis for its assertion of state jurisdiction over ISP-bound traffic (i.e., it asserted no jurisdictional claim based on state contract law or other legal or equitable considerations, such as the FCC had noted might underpin some state decisions).

In March, Bell Atlantic moved the Department to modify its Order in light of the FCC's ruling. After considering the motion and responsive comments, the Department today concludes that the FCC ruling has superseded its own 1998 Order and has struck down the sole and express basis for its assertion of state jurisdiction over ISP-bound traffic. The net effect of the FCC's ruling is to nullify MCI WorldCom Technologies, Inc., D.T.E. 97-116. Relying, then, on Section 252 of the 1996 Act, the Department has directed Bell Atlantic and the CLECs to negotiate their renewed dispute over payment for handling each other's ISP-bound traffic. The Department has offered to mediate the dispute, if necessary, and to arbitrate the matter, if required to.

To guide the parties in their negotiations, the Department has set forth certain views on competition in telecommunications and on its need to avoid regulatory distortions that falsely mimic competition but, in fact, simply lead to inefficient, market-entry advantage for certain CLEC ISP entities through regulator-imposed income transfers.

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I. INTRODUCTION: THE DEPARTMENT'S ORDER OF OCTOBER 21, 1998

On October 21, 1998, the Department of Telecommunications and Energy ("Department") issued an Order granting the petition of MCI WorldCom, Inc.[1] ("MCI WorldCom") and directing New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts ("Bell Atlantic") to continue reciprocal compensation payments[2] for the termination of local exchange traffic to Internet Service Providers ("ISPs") in accordance with its interconnection agreements. MCI WorldCom Technologies, Inc., D.T.E. 97-116, at 12 (1998) ("MCI WorldCom" or "October Order" or "Order"). The Department stated that it expected Bell Atlantic to apply its definition of local exchange traffic to all interconnection agreements between the ILEC Bell Atlantic and other Competitive Local Exchange Carriers ("CLECs"). Id. at 14.

In MCI WorldCom, the Department determined that a call to an ISP ("ISP-bound

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[2] The Telecommunications Act of 1996 ("1996 Act") requires each incumbent local exchange carrier ("ILEC") (Bell Atlantic is the ILEC in Massachusetts) to open its monopoly networks to effective competition before that ILEC will be authorized to provide long-distance telecommunications services. Section 251(b)(5) of the Act requires all local exchange carriers to compensate each other for the transport and termination of local traffic that originates on one carrier's network and terminates on another carrier's network. 47 U.S.C. § 251(b)(5). The Federal Communications Commission has interpreted this provision as limiting reciprocal compensation payments to the transport and termination of *local* traffic. See 47 C.F.R. § 51.701.

traffic"[3]) is functionally two separate services: (1) a local call to the ISP, and (2) an information service provided by the ISP when the ISP connects the caller to the Internet. Id. at 11. Because the Department decided that a call from a Bell Atlantic customer to an ISP that is terminated by MCI WorldCom–and by extension, other CLECs--is a "local call," for purposes of the subject interconnection agreements, CLECs transporting and terminating calls to ISPs were deemed eligible for reciprocal compensation. Id. at 12-13. However, in its Order, the Department explicitly recognized that proceedings pending before the Federal Communications Commission ("FCC") could require it to modify its holding. Id. at 5 n.11. Finally, concerns that ISPs in Massachusetts may be establishing themselves as CLECs solely (or predominantly) to receive reciprocal compensation from Bell Atlantic prompted the Department to request information that would enable it to determine whether to open an investigation into the regulatory status of particular CLECs. Id. at 13.

II. EVENTS SINCE OCTOBER 21, 1998

On November 6, 1998, Bell Atlantic filed a Motion for Extension of the Judicial Appeal Period for all parties until 20 days after the FCC issues a ruling on reciprocal compensation for ISP-bound traffic. On November 10, 1998, the Department granted Bell Atlantic's motion.

Also on November 10, 1998, MCI WorldCom filed a Motion for Reconsideration arguing that a Department decision to open an investigation into the regulatory status of certain CLECs

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[3] There are several ways to describe dial-up, Internet calling. For consistency, we adopt the FCC's term "ISP-bound traffic".

would be inconsistent with the Act.[4] On February 25, 1999, the Department issued an Order denying MCI's Motion for Reconsideration, finding that the Department's general supervisory and regulatory jurisdiction permits it to request information from telecommunications carriers and to use that information in determining whether to open an investigation.[5] MCI WorldCom, D.T.E. 97-116-A at 4.

On February 26, 1999, the FCC issued a Declaratory Ruling and Notice of Proposed Rulemaking in which it decided that jurisdiction over ISP-bound traffic is interstate. In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Declaratory Ruling (rel. Feb. 26, 1999) ("Internet Traffic Order"); Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, Notice of Proposed Rulemaking (rel. Feb. 26, 1999) ("NPRM"). The FCC concluded that ISP-bound traffic does "not terminate at the ISP's local server . . . but continue[s] to the ultimate destination or destinations, specifically at a[n] Internet website that is often located in another state." Internet Traffic Order at ¶ 12. Having decided that jurisdiction over ISP-bound traffic is determined by the nature of the end-to-end transmission between a caller and an Internet site, id. at ¶¶ 12 and 18, the FCC determined that because ISP-bound traffic is interstate, that jurisdiction over the

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4 MCI also requested an extension of the judicial appeal period. The Department determined that this request was moot because the Department had previously granted Bell Atlantic's motion to extend the judicial appeal period for all parties. MCI WorldCom, D.T.E. 97-116-A at 5 (February 25, 1999).

5 Before the issuance of D.T.E. 97-116-A, the Department's Telecommunications Division issued data requests to ten CLECs to determine whether their customer bases were predominantly or solely ISPs, and whether any affiliate relationship exists between the CLECs and their ISP customers. Responses were received on or before January 20, 1999.

question of reciprocal compensation for such traffic, on the claim that it is local, lies with the FCC. Id. at ¶ 12. However, the FCC reserved for future rulemaking the question of payment for ISP-bound traffic among LECs. Id. at ¶ 21. Until that rulemaking is final, state commissions retain some, undefined measure of authority over ISP-bound traffic–consistent, of course, with the FCC's declaratory ruling on jurisdiction. Id. at ¶ 22. In the interim, state commissions either may continue, where appropriate, to enforce existing reciprocal compensation obligations between carriers under interconnection agreements or may, as needed, modify those obligations based on its findings in the Internet Traffic Order. Id. at ¶¶ 25-27. And, citing this Department's concern over "gaming" of reciprocal compensation in its October Order, the FCC "note[d] that issues regarding whether an entity is properly certified as a LEC if it serves only or predominantly ISPs are matters of state jurisdiction." Id., at ¶ 24 and n. 78.

On March 2, 1999, Bell Atlantic filed a Motion for Modification of the Department's MCI WorldCom Order ("Motion for Modification") asking the Department to determine that its interconnection agreements do not require reciprocal compensation payments for ISP-bound traffic. Bell Atlantic argues that because the FCC determined that ISP-bound traffic is interstate and not local traffic, the reciprocal compensation requirements of the 1996 Act and the FCC's rules do not govern inter-carrier compensation for this traffic (Motion for Modification at 2). Therefore, Bell Atlantic contends that it is no longer required to make such payments. Bell Atlantic further states that it will escrow reciprocal compensation payments for ISP-bound traffic until the Department determines whether to modify MCI WorldCom (id.).[6] The Department

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[6] Bell Atlantic does not indicate how it will differentiate ISP-bound traffic from local

(continued...)

originally established deadlines of March 19, 1999 for opponents' responses to the Motion for Modification and March 26, 1999 for Bell Atlantic's reply to those responses.

On March 10, 1999, Bell Atlantic responded to objections to its unilateral decision to escrow payments. Bell Atlantic filed a Motion for Stay Pending Decision on Motion for Modification ("Motion for Stay"). The Motion for Stay sought permission to escrow reciprocal compensation, pending a Department ruling on its Motion for Modification.[7]

The following entities[8] filed comments in response to the Motion for Modification: Teleport Communications-Boston, Inc., and Teleport Communications Group, as AT&T companies, and AT&T Communications of New England, Inc. (collectively "AT&T"); Cablevision Lightpath-MA, Inc. ("Cablevision"); Choice One Communications, Inc. ("Choice One"); a coalition of Massachusetts CLECs and ISPs (the "Coalition"); CoreComm Limited and CoreComm Massachusetts, Inc. (jointly "CoreComm"); Focal Communications Corporation ("Focal"); Global NAPs, Inc. ("GNAPS");[9] Intermedia Communications, Inc. ("Intermedia");

(...continued)
traffic carried on its network. Instead, Bell Atlantic sets up a 2:1 proxy by stating (1) that it will escrow amounts in excess of the 2:1 ratio, billed to any CLEC that terminates at least twice as much traffic as it sends to Bell Atlantic, but (2) that if a CLEC demonstrates that the imbalance is associated with "local" traffic, Bell Atlantic will pay reciprocal compensation charges for those calls (Motion for Modification at 2 n.3).

7 Bell Atlantic notes that it filed the Motion for Stay to ensure that there would be "no ambiguity regarding [Bell Atlantic's] ability to withhold payments while the Department considers the Motion for Modification" (Motion for Stay at 3 n.2).

8 In addition to parties to D.T.E. 97-116, the Department allowed comments from all facilities-based CLECs with interconnection agreements with Bell Atlantic.

9 On March 4, 1999, GNAPS filed a petition for intervention. The Department has yet to (continued...)

Level 3 Communications, Inc. ("Level 3");[10] MCI WorldCom; NEVD of Massachusetts, LLC ("NEVD"); PaeTec Communications, Inc.; Prism Operations, LLC ("Prism");[11] RCN-BecoCom, LLC ("RCN"); and RNK, Inc. ("RNK").[12] Bell Atlantic filed reply comments on March 15, 1999.[13]

On March 23, 1999, the Department issued MCI WorldCom, D.T.E. 97-116-B (1999) ("Escrow Order") granting Bell Atlantic interim relief from our prior Order and authorizing Bell Atlantic to place disputed reciprocal compensation payments in escrow, pending a final decision on its Motion for Modification. That Order scheduled oral argument on the contending claims, but argument was later postponed.[14]

On March 31, 1999, RNK filed a Motion for Clarification, Suspension of Escrow Order, and Reconsideration of Escrow Order ("RNK Motion for Clarification"). RNK seeks clarification on five points: (1) the relationship of the Escrow Order and specific terms contained in RNK's interconnection agreement with Bell Atlantic concerning the identity of the escrow

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(...continued)
rule on that petition.

10 Level 3 is the successor-by-merger of XCOM Technologies, Inc., which is an intervenor.

11 Prism formerly was known as Transwire Operations, LLC.

12 RCN, Choice One, the Coalition, Focal, GNAPS, NEVD, Norfolk, Prism, and RNK are not parties in D.T.E. 97-116.

13 With the Department's permission, MCI WorldCom filed its response on March 15, 1999, and Bell Atlantic filed its reply to MCI WorldCom's response on March 18, 1999.

14 Bell Atlantic's appeal of the hearing officer ruling on oral argument need not be ruled upon, for today's Order renders it moot.

agent, the rate of interest on the escrow account, and the responsibility for escrow costs; (2) whether escrow authority applies to reciprocal compensation accrued only after March 23, 1999, the date of the Escrow Order; (3) whether escrow applies to reciprocal compensation due and payable for traffic only in excess of the 2:1 ratio; (4) whether the Escrow Order uses differing meanings for the terms "Internet-bound traffic" and "ISP-bound" traffic; and (5) whether the authority to escrow granted to Bell Atlantic should even apply to CLECs, like RNK, which provide multiple telecommunications services besides simply serving ISPs (RNK Motion for Clarification at 4-8). Until the Department rules on these issues, RNK argues, the Escrow Order should be suspended (id. at 8-10). RNK also argues that "extraordinary circumstances," particularly the escrow's adverse financial effect on small start-up CLECs, dictate that the Department reconsider the Escrow Order (id. at 10-11). Responses to RNK's Motion for Clarification were filed on April 5, 1999 by Bell Atlantic, GNAPS, and the Coalition.

Finally, on April 16, 1999, GNAPS filed a complaint against Bell Atlantic. The complaint seeks adjudication of GNAPS's claimed right to receive reciprocal compensation payments for calls that Bell Atlantic customers make to ISPs, where such customers receive their dial-in connections to the public switched network from GNAPS.

Comments have been extensive. After reviewing them, the Department sees no need for the oral argument originally scheduled in its Escrow Order of March 23. Therefore, Bell Atlantic's Appeal of the Hearing Officer's Ground Rules is dismissed as moot. RNK's Motion for Clarification is addressed in the context of our ruling on Bell Atlantic's Motion for

Modification.[15]

III. POSITIONS OF THE PARTIES AND COMMENTERS

A. Bell Atlantic

Bell Atlantic claims that the Department's Order in MCI WorldCom must be modified because its conclusion that ISP-bound traffic was local was based on mistakes of both fact and law regarding jurisdiction over ISP-bound traffic (Motion for Modification at 8). According to Bell Atlantic, the FCC in its Internet Traffic Order determined, contrary to the Department's finding in MCI WorldCom, that an ISP-bound call cannot be separated into two components but is a single, uninterrupted transmission from a caller to a remote website (id.). Bell Atlantic contends that because ISP-bound traffic is not local, such traffic is not subject to reciprocal compensation under the Act, the FCC's rules, or any of Bell Atlantic's interconnection agreements[16] (id. at 9). Moreover, Bell Atlantic argues, the FCC, contrary to the Department's October Order and the CLECs' present claim, rejected the argument that because ISPs have local telephone numbers, calls placed to those numbers are local calls (id.). Bell Atlantic indicates the fact that the FCC exempted enhanced service providers ("ESPs") from access charges indicates its understanding that ESPs in fact use interstate access service; otherwise, the exemption would

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[15] Because the substance of RNK's Motion for Clarification is addressed in the Department's findings in this Order, we need not address the question of whether the Escrow Order, as interlocutory, may properly be the subject of a motion for reconsideration or clarification (see RNK Motion for Clarification at 4 n.1).

[16] Bell Atlantic indicates that its interconnection agreements only require reciprocal compensation for local traffic and that, to be "local," the call must originate and terminate within a given local access transport area ("LATA") in the Commonwealth of Massachusetts (id. at 9).

not be necessary (id.). Furthermore, Bell Atlantic argues, the FCC's recent GTE and Internet Traffic Orders have made it clear that Internet-bound traffic is interstate and therefore has no severable local component (id. at 10).

Concerning its contracting intent, Bell Atlantic states that it has not agreed to pay reciprocal compensation for ISP-bound traffic (Bell Atlantic Reply Comments at 8). Bell Atlantic argues that as a threshold legal matter and as a matter of contract law, the factual issues raised in the pleadings filed in opposition to the Motion for Modification may not constitute grounds for a determination that reciprocal compensation should be imposed for ISP-bound traffic under the interconnection agreements (id.). Bell Atlantic contends that when the wording of a contract is unambiguous, the contract must be enforced according to its terms (id. at 8-9). Because the Department has previously determined the agreements at issue to be unambiguous, Bell Atlantic argues that the Department should not now admit parole or extrinsic evidence relating to the parties' intent regarding the agreements (id.). Bell Atlantic argues that public policy and the impact on CLECs and ISPs have nothing to do with what the contracts actually say (id.). Accordingly, Bell Atlantic contends that ISP-bound traffic is not eligible for reciprocal compensation under Bell Atlantic's interconnection agreements and, further, that the CLECs have already received substantial compensation to which they are not entitled under those agreements (Bell Atlantic Motion at 10).

With respect to continued reciprocal compensation for ISP-bound traffic, Bell Atlantic states that it does not dispute that the FCC has not precluded the payment of reciprocal compensation for ISP-bound traffic in all circumstances, but that the Department's conclusion in

MCI WorldCom was not based on any of the grounds permitted by the FCC (Bell Atlantic Reply Comments at 5). According to Bell Atlantic, the FCC stated that state commissions that have ordered the payment of reciprocal compensation for Internet-bound traffic might conclude, depending on the basis of those decisions, that it is not necessary to revisit those determinations (id. at 6). Bell Atlantic notes, however, that MCI WorldCom did not rely on any of the other bases that the FCC recognized (id.). Bell Atlantic contends, in the alternative, that if the Department wishes to consider whether reciprocal compensation should continue to be imposed for Internet-bound traffic, the Department must resolve the disputed factual assertions raised by the parties in an adjudicatory proceeding that permits the parties to present evidence (id.).

B. CLECS

First, the CLECs point out that the FCC explicitly stated that "nothing in this [Internet Traffic Order] precludes state commissions from determining, pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the [FCC's] rulemaking" (see e.g., Intermedia Comments at 5; Prism Comments at 3; Focal Comments at 11; NEVD Comments at 8, citing Internet Traffic Order at ¶ 27).

Next, the CLECs argue that the FCC's ruling on the jurisdictional analysis of calls to ISPs in its Internet Traffic Order in no way requires the Department to revisit MCI WorldCom; rather, in their view, it reaffirms the Department's Order (see e.g., AT&T Comments at 3; Coalition Comments at 3; MCI WorldCom Comments at 7-8; CoreComm Comments at 1; RNK Comments at 2). Level 3, for instance, argues that "the Department was quite clear that the

determination it was making was for the purpose of classifying the traffic in the Agreement. It was not making a jurisdictional decision." Level 3 also argues that the FCC made it clear that its jurisdictional decision on ISP-bound traffic should not interfere with the decision made by a state commission (Level 3 Comments at 5; see also Choice One Comments at 3-5). According to the CLECs, the Department did not declare that ISP-bound traffic is "local" in the sense of "jurisdictionally intrastate," but only that those calls are more appropriately viewed as local traffic instead of long distance calls. The CLECs contend, therefore, that there is no conflict between MCI WorldCom and the FCC's Internet Traffic Order (see e.g., GNAPS Comments at 6; RCN Comments at 2, citing MCI WorldCom, D.T.E. 97-116, at 11-13; PaeTec Comments at 3). The CLECs maintain that Bell Atlantic chooses to focus only on the FCC's decision concerning jurisdiction, whereas the FCC specifically recognized the limit of that analysis (MCI WorldCom Comments at 10; CoreComm Comments at 3, citing Internet Traffic Order at ¶ 20) by stating that "the Commission continues to discharge its interstate regulatory obligations by treating ISP-bound traffic as though it were local" (MCI WorldCom Comments at 11; RCN Comments at 4, citing Internet Traffic Order at ¶ 5).

CoreComm asserts that the FCC divided the analysis in its Internet Traffic Order into two parts, "one focusing on the nature of ISP-bound traffic for the purpose of resolving jurisdictional issues and the other focusing on the separate issue of what sort of regulatory treatment should be accorded such calls" (CoreComm Comments at 3). CoreComm supports this argument by quoting the first sentence of the FCC's Internet Traffic Order: "Identifying the jurisdictional and regulatory treatment of ISP-bound communications requires us to determine how Internet traffic

fits within our existing regulatory framework" (CoreComm Comments at 4, citing Internet Traffic Order at ¶ 1 (emphasis added by CoreComm)). CoreComm argues that the FCC recognizes the difference between "jurisdictional analysis" and "regulatory treatment" (CoreComm Comments at 4; see also Focal Comments at 10-11).

The CLECs also contend that § 252(e)(1) of the Act gives the states the authority to interpret the interconnection agreements that they approved (see, e.g., RNK Comments at 3; NEVD Comments at 3). The CLECs base their arguments on the FCC's statement that "[n]othing in this [Internet Traffic Order], therefore, necessarily should be construed to question any determination a state commission has made, or may make in the future, that parties have agreed to treat ISP-bound traffic as local traffic under existing interconnection agreements" (see e.g., Coalition Comments at 4; PaeTec Comments at 6 n.16; Level 3 Comments at 5; RCN Comments at 3-4; NEVD Comments at 4, each citing Internet Traffic Order at ¶ 24). MCI WorldCom contends that "under well-established principles of contract construction, parties' intent is determined with respect to the time of contracting, not at some subsequent date" and at the time when it entered into its interconnection agreement with Bell Atlantic, both it and Bell Atlantic intended to treat calls to ISPs as local traffic subject to reciprocal compensation (MCI WorldCom Comments at 14; see also AT&T Comments at 4). In addition, the CLECs argue that the FCC identified "illustrative" factors[17] a state commission could consider when determining

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[17] These "illustrative" factors are:

> whether incumbent LECs serving ESPs [Enhanced Service Providers] (including ISPs) have done so out of intrastate or interstate tariffs; whether revenues associated with those services were counted as intrastate or interstate revenues;

(continued...)

whether the parties to an interconnection agreement intended to subject ISP-bound traffic to reciprocal compensation. Furthermore, the CLECs argue, the Department previously considered these factors and correctly concluded that ISP-bound traffic is subject to reciprocal compensation under existing interconnection agreements (see e.g., MCI WorldCom Comments at 12-14; RCN Comments at 5-7; Intermedia Comments at 4-5; Focal Comments at 5; PaeTec Comment at 5). MCI WorldCom, for instance, contends that the Department, in MCI WorldCom, considered the factors the FCC identified in the Internet Traffic Order at ¶ 24, and reached a conclusion that Bell Atlantic and MCI WorldCom agreed to compensate each other for termination of all local calls by finding that (1) the characteristics of ISP-bound traffic are identical to any other local calls, (2) Bell Atlantic and all other carriers charge their customers local rates for ISP-bound traffic, (3) the ISPs' premises are located within the LATA, thus meeting the definition of local traffic in its Agreement,[18] and (4) that ISP-bound traffic is subject to reciprocal compensation obligation for the same reasons that other kind of calls -- such as calls to private networks -- are subject to

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17 (...continued)

> whether there is evidence that incumbent LECs or CLECs made any effort to meter this traffic or otherwise segregate it from local traffic, particularly for the purpose of billing one another for reciprocal compensation; whether, in jurisdictions where incumbent LECs bill their end users by message units, incumbent LECs have included calls to ISPs in local telephone charges; and whether, if ISP traffic is not treated as local and subject to reciprocal compensation, incumbent LECs and CLECs would be compensated for this traffic.

Internet Traffic Order at ¶ 24.

18 But see Internet Traffic Order, at ¶ 12 ("The fact that the facilities and apparatus used to deliver traffic to the ISP's local servers may be located within a single state does not affect our [FCC's] jurisdiction").

reciprocal compensation (MCI Comments at 3-4, 12-13, citing MCI WorldCom at 10). Accordingly, while the FCC and the Department may consider other compensation mechanisms in the future, reciprocal compensation under the existing interconnection agreement should not be modified (Level 3 Comments at 7; Prism Comments at 6-7).

AT&T argues that existing interconnection agreements should remain in full force, pending renegotiation by the parties and the FCC's completion of its rulemaking on inter-carrier compensation for ISP-bound traffic (AT&T comments at 6, citing the AT&T-Bell Atlantic Interconnection Agreement § 7.3 (providing "Parties shall negotiate in good faith such affected provisions with a view toward agreeing to acceptable new terms as may be required or permitted as a result of such legislative, regulatory, judicial or other legal action")).

The CLECs bolster their argument concerning intent by noting that the telecommunication industry's custom and usage regarding ISP-bound traffic at the time the interconnection agreements were executed support their assertion that calls to ISPs are considered local and, therefore, subject to reciprocal compensation.[19] Even Bell Atlantic, the CLECs contend, recognized that calls to ISPs were local as it aptly demonstrated in its formal "Reply Comments" submitted in the FCC's proceeding to develop rules to implement §§ 251 and 252 of the Act (see e.g., Level 3 Comments at 5-6; GNAPS Comments at 3-4, citing In Re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,

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[19] The CLECs cite the Alabama Public Service Commission's recent conclusion "that the industry custom and usage at that time [the interconnection agreements under review herein were entered] dictated that ISP traffic be treated as local and, therefore, subject to reciprocal compensation." (AT&T Comments at 5; MCI Comments at 14-16, citing In Re: Emergency Petitions of ICG Telecom Group Inc. and ITC Deltacom Communications Inc., Alabama PSC docket 26619 at 25 (Mar. 4, 1999)).

CC docket no. 96-98, Reply Comments of Bell Atlantic at 21 (submitted May 30, 1996)). Arguing in favor of an actual compensation mechanism as opposed to a bill and keep arrangement supported by the CLECs, Bell Atlantic declared that (1) calls to ISPs are local, (2) subject to reciprocal compensation, and (3) the rates Bell Atlantic proposed for such reciprocal compensation were reasonable (see e.g., GNAPS Comments at 3-4; Focal Comments at 8; NEVD Comments at 12, citing In Re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC docket no. 96-98, Reply Comments of Bell Atlantic at 21 (submitted May 30, 1996)). The CLECs argue that the fact that Bell Atlantic did not accurately predict the impact of its proposal (which eventually prevailed) should not provide a valid basis for Bell Atlantic to repudiate its agreements (Level 3 Comments at 6). While Bell Atlantic may not have foreseen the traffic imbalance caused by many ISPs opting to take service from a CLEC, Bell Atlantic should, as the party with the much more substantial sales, marketing, and technical experience, be assigned any risks associated with its poor foresight (NEVD Comments at 13).

GNAPS further supports the CLECs argument that Bell Atlantic considered dial-up ISP calls as local by citing to Bell Atlantic's "comparably efficient interconnection" ("CEI") plans for its own Internet access service (see e.g., GNAPS Comments at 9; Focal Comments at 8-9). In its CEI plans, Bell Atlantic stated that "[f]or dial-up access, the end-user will place a local call to the Bell Atlantic Internet hub site from either a local residence or business line or from an Integrated Services Digital Network ("ISDN") service" (see e.g., GNAPS Comments at 9, citing Amendment to Bell Atlantic CEI Plan to Expand Service Following Merger with NYNEX at 2,

CCB Pol 96-09 (filed May 5, 1997); Focal Comments 8-9). Accordingly, GNAPS asserts that it is obvious that Bell Atlantic understood fully the general industry practice on treating ISP-bound calls as local (GNAPS Comments at 9-10)

PaeTec argues that Bell Atlantic, in its interconnection agreements, could have specifically carved out ISP-bound traffic as non-local in the same manner as other traffic with all the characteristics of local calls was excluded from reciprocal compensation obligations (PaeTec Comments at 6 (claiming that the Bell Atlantic-MCI WorldCom interconnection agreement specifically identifies Feature Group A traffic as not subject to reciprocal compensation)). Because ISP-bound traffic was not excluded, PaeTec argues, Bell Atlantic's attempt to exclude such traffic now from its reciprocal compensation obligations is entirely a post hoc rationale now that the balance of this traffic goes against it (id. at 6-7). Moreover, PaeTec states, Bell Atlantic has a serious credibility problem with respect to this issue: if Bell Atlantic now is to be believed that it never intended to include ISP-bound traffic within the reciprocal compensation provisions of its interconnection agreement with MCI WorldCom, then one must also believe that Bell Atlantic intended to transport and terminate all traffic originated by a MCI WorldCom customer to a Bell Atlantic customer that happened to be an ISP, without any compensation at all from MCI WorldCom (id. at 8). RNK argues that another indication that Bell Atlantic intended ISP-bound traffic to be "local" for reciprocal compensation purposes is the fact that Bell Atlantic has paid for and accepted credit for local traffic that included ISP-bound calls (RNK Comments at 2). RNK thus makes a "course of conduct under the contract" argument to supplement the "usage of the trade" argument raised by GNAPS (GNAPS Comments at 9-10).

With respect to state law grounds, the CLECs argue the Department has authority to require reciprocal compensation for Internet-bound traffic as acknowledged in MCI WorldCom (Prism Comments at 3-4; RNK Comments at 3; NEVD Comments at 4). Prism argues that there is no federal law that prohibits applying reciprocal compensation to non-local calls, and points to the FCC's statement that "[i]n so construing the statutory obligation, we did not preclude parties from agreeing to include interstate traffic (or non-local intrastate traffic) within the scope of their interconnection agreements, so long as no Commission rules were otherwise violated" for support (Prism Comments at 7, citing Internet Traffic Order at ¶ 24); see also, NEVD Comments at 7). In addition, the CLECs also argue that applying the fact that ISP-bound traffic has been exempt from interstate access charges establishes that such traffic is subject to reciprocal compensation (see e.g., Prism Comments at 6; PaeTec Comments at 5; NEVD Comments at 6). The CLECs argue that, pursuant to the FCC's Internet Traffic Order, "state commissions, not this Commission, are the arbiters of what factors are relevant in ascertaining the parties' [contracting] intentions" (PaeTec Comments at 9, citing Internet Traffic Order at ¶ 24). Referring to G.L. c. 106, § 1-205(5), PaeTec asserts that because there are no express or implied terms in the interconnection agreement excluding the usage of trade that a telephone call to the telephone number of an ISP terminates when the call is answered, that usage of trade must be considered part of the definition of reciprocal compensation in the interconnection agreement" (PaeTec Comments at 10-11).

The Coalition asserts that if calls to ISPs are interstate as explained in FCC's ruling, then one may need to question how Bell Atlantic can carry such traffic because it currently lacks the

authority to do so until it meets the requirements § 271 (Coalition Comment at 6). In addition, the Coalition contends that if the Department were now to adopt the single transmission analysis used in the FCC's ruling, then serious questions would arise concerning the consistency of this new analysis with the segmented transmission analysis used in Voice Mail, D.P.U. 97-101 (1998) (id. at 7). Lastly, the Coalition points out that there is "a significant question of estoppel and reliance on such practice by the CLECs that have expended very significant financial and human resources based upon the established practice that traffic to ISPs requires ILEC payment of reciprocal compensation" (id. at 7).

Regarding public policy concerns, RNK asserts that growth of the Internet is in the public interest and that the absence of reciprocal compensation will result in irreparable harm to CLECs and Massachusetts' consumers (RNK Comments at 5-6). The CLECs also contend that sound economic policy and regulatory fairness require full compensation for their significant network costs related to delivering calls to ISPs (Cablevision Letter at 2; GNAPS Comment at 4; Focal Comments at 7; RNK Comments at 6; NEVD Comment at 14).

Concerning the due process issues, MCI WorldCom contends that if the Department were to reconsider any issue, the proper procedure would be for the Department to hold an evidentiary hearing in order to investigate the parties' intent regarding calls to ISPs at the time they entered into the interconnection agreements (MCI WorldCom Comments at 17-18). RCN argues that the Department should leave MCI WorldCom in full force pending the completion of evidentiary hearings on whether the Order continues to be valid (RCN Comments at 7). GNAPS asserts that if the Department wishes to make a re-determination on the intentions of the parties in the

affected agreement, the Department should conduct an evidentiary hearing to explore how the factors identified in the FCC's Internet Traffic Order apply (GNAPS Comments at 8).

IV. ANALYSIS AND FINDINGS

A. Effect of the Federal Communications Commission's Internet Traffic Order on the Continued Validity of the Department's Order in MCI WorldCom

On February 26, 1999, the FCC declared that the 1996 Act, 47 U.S.C. sec. 251(b)(5), mandated reciprocal compensation for the transport and termination of *local* traffic *only*. The FCC further held that this mandate does not extend to ISP-bound traffic, because ISP-bound traffic is not local but is interstate *for purposes of the 1996 Act's reciprocal compensation provisions*. ISP-bound traffic is thus not subject to state enforcement under the 1996 on the grounds that it is local traffic. Internet Traffic Order at ¶¶ 12 and 26 n. 87.

In ruling in favor of Federal versus state regulatory jurisdiction over ISP-bound traffic and in construing 47 U.S.C. sec. 251(b)(5), the FCC focused on the"end-to-end" nature of the Internet communication. The initiating caller or customer is one "end" of the communication, and the terminating "end" is the web or other Internet site called by the customer. The FCC rejected arguments that would segment such traffic into intra- and inter-state portions and thereby also rejected a consequent, artificial segmentation of jurisdiction. Id. at ¶ 11. The FCC noted that it "analyzes the totality of the communication when determining the jurisdictional nature of a communication . . . [and] recognizes the inseparability, for purposes of jurisdictional analysis, of the information service and the underlying telecommunications." Id. at ¶ 13. The FCC considers each such commercial transaction as "one call" "from its inception to its completion" and accordingly rejects the jurisdictional limitation implied by

arbitrarily isolating the initial part of the call from the rest of the stream of interstate commerce. Id. at ¶ 11.[20]

This line of analysis is certainly not surprising or even novel. For decades, decisional law has expansively analyzed questions of Federal versus state jurisdiction under the Commerce Clause, U.S. Const. Art. I, sec. 8, cl. 3, in this way. See, e.g., *Katzenbach* v. *McClung,* 379 U.S. 294 (1964) (practically unlimited view of the reach of Congress to local activity under the Commerce Clause if effect on interstate commerce can be posited). Unless and until modified by the FCC itself or overturned by a court of competent jurisdiction,[21] the FCC's view of the 1996 Act must govern this Department's exercise of its authority over reciprocal compensation; and the FCC so advises us. Internet Traffic Order at ¶ 27.

In October 1998, the Department had ruled on this very same, jurisdictional question in MCI WorldCom, D.T.E. 97-116.[22] On March 2, 1999, Bell Atlantic moved the Department to

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20 The FCC characterizes the Internet as "a powerful instrumentality of interstate commerce." Internet Traffic Order at ¶ 6. Although the FCC admits its treatment of enhanced service providers ("ESPs") has something of an *intrastate* flavor, id. at ¶ 5, describing the Internet in this way virtually dictated the FCC's "one call" analysis. See also *Access Charge Reform*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd at 15983, 1631-33 (1997). The FCC has evidently determined to close this avenue of caselaw by distinguishing it, somewhat artificially, from its holding in Internet Traffic Order.

21 The recent "transferring [of] the States' regulatory authority wholesale to the Federal Communications Commission" for which Justice Thomas recently faulted the Court's majority in *AT&T Corp.* v. *Iowa Utilities Board* suggests that judicial reversal is unlikely. *AT&T Corp.* v. *Iowa Utilities Board*, __ U.S. __, at __, 119 S.Ct. 721, 741 (1999) (Thomas, J., dissenting).

22 Although numerous CLECs intervened in the proceeding, the Department had before it only the complaint of MCI WorldCom for alleged breach of contract by Bell Atlantic.

(continued...)